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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1669

DELTA STEAMSHIP LINES, INC.,
Petitioner

versus

PAUL TURNER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

G. EDWARD MERRITT,
Attorney for Petitioner
Delta Steamship Lines, Inc.
2100 International Trade Mart Building
New Orleans, Louisiana 70130

Of Counsel:
Terriberry, Carroll
Yancey & Farrell

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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Now comes Delta Steamship Lines, Inc., and respectfully petitions this Honorable Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which declined to review its affirmance of the Trial Court judgment in favor of Respondent.

(a) *Opinions Below*

The opinions of the United States Court of Appeals for the Fifth Circuit denying rehearing and affirming the Trial Court are attached as appendices hereto. The opinion of the Trial Court, the United States District Court for the Eastern District of Louisiana, also appears in an appendix hereto. None of these decisions is officially reported.

(b) *Jurisdictional Grounds*

(1) The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on February 4, 1977.

(2) The United States Court of Appeals for the Fifth Circuit denied the petitions for rehearing on March 2, 1977.

(3) The jurisdiction of this Court is invoked under 28 USC 1254 (1).

(c) *Questions Presented for Review*

(1) Whether the Court below erred in affirming a jury verdict where there was no evidence whatsoever to demonstrate unseaworthiness or negligence, and where the jury's verdict was clearly the result of passion or prejudice.

(2) Whether the Court below erred in affirming the Trial Court's granting of a new trial on damages only, in light of the jury's award which the Trial Court found to be "extraordinarily excessive".

(3) Whether the Fifth Circuit's rule which permits remittitur only to the maximum possible amount which the jury could have awarded under the circumstances, violates the Petitioner's right to a jury trial under the Seventh Amendment to the United States Constitution.

(d) *Statutes and Regulations Involved*

(1) Amendment VII, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

(2) 29 C.F.R. 1910.95 (b):

(1) When employees are subject to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the Table.

Table G-16 - Permissable Noise Exposures[1]

Duration Per Day, Hours	Sound Level dBA Slow Response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

[1]When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: C1/T1 plus C2&T2 Cn/Tn exceeds unity, then the mixed exposure should be considered to exceed the limit value. Cn indicates the total time of exposure at a specified noise level, and Tn indicates the total

time of exposure permitted at that level. Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

(2) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

(3) In all cases where the sound levels exceed the values shown herein, a continuing effective hearing conservation program shall be administered.

(3) Rule 59(a) Federal Rules of Civil Procedure:

Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(e) *Statement of the Case*

Paul Turner ("Turner") sued Delta Steamship Lines, Inc. ("Delta") claiming that he suffered a ringing in his ears

(Tinnitus) and a slight high frquency hearing loss as a result of exposure to the noise of the anchor windlass and the cherry pickers (cranes) of the DELTA URUGUAY ("the vessel") during the course of his eleven months service on that vessel.[1] After trial, the jury found the vessel unseaworthy, and Delta negligent under the Jones Act.[2] The jury awarded damages of $129,000.[3] The District Court, considering the jury's award "extraordinarily excessive"[4], ordered a new trial on the issue of damages alone unless the plaintiff accepted a remittitur to $50,000, the maximum amount which the Court determined the jury could reasonably have awarded.[5] The court denied Delta's motions for directed verdicts, judgment notwithstanding the verdict, and new trial.[6] Turner accepted the remittitur "under protest".[7] Delta and Turner appended to the United States Court of Appeals for the Fifth Circuit which affirmed *per curiam* and denied a rehearing.

Turner was boatswain on the vessel from August 25, 1970 through August 9, 1971.[8] In February, 1971, he first noticed a ringing in his ears, and a slight hearing loss which he said made music sound flat.[9] Although the condition did

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1. App. 1
2. App. 535
3. App. 536
4. App. 543
5. App. 542; also, see appendix hereto.
6. *Ibid.*
7. App. 547 (A Fifth Circuit practice recently disapproved by this Court in Donovan v. Penn Shipping Co., No. 76-613, Oct. Term 1976, decided Feb. 18, 1977).
8. App. 133
9. App. 195, 198.

not worsen,[10] he later sought medical treatment at the U.S. Public Service Hospital in New Orleans where his condition was disgnosed as tinnitus (ringing in the ears) and a slight hearing loss in the high frequency range.[11] Turner described the ringing in his ears as "like a real fine whistle or little ringing" in the ear.[12] It was mostly noticeable during quiet periods, and can be overcome by playing soft music.[13]

Although Turner has been sailing ever since as a boatswain for Delta, and in fact served on another Delta vessel which had the identical equipment of which he complained in this litigation,[14] he claimed his tinnitus and high frequency hearing deficit were caused by exposure to the noise of the anchor windlass of the DELTA URUGUAY. As boatswain, he operated the anchor windlass most of the times when it was used.[15]

The anchor windlass is located on the open deck at the bow of the vessel. It is used: 1) to lower and raise the anchor; 2) to handle mooring lines in docking and undocking the ship. and 3) in assisting in shifting the vessel.

In lowering the anchor, the windlass is usually not used at all.[16] If used, it is used for about 5 minutes to "walk out" the anchor a few feet, following which the anchor is allowed to dop of its own weight.[17] In raising the anchor, if

10. App. 196-197
11. App. 204-205
12. App. 173
13. App. 174
14. App. 194
15. App. 156
16. App. 182
17. *Ibid.*

the anchor is embedded in mud there is a strain on the windlass when the anchor is first heaved on, until it frees the bottom.[18] Thereafter, the strain on the windlass is minimal since the water supports most of the anchor's weight until it is near the surface from where it is "walked in". [19]

In docking, the windlass is turned on after the first line goes ashore.[20] Although on, the windlass is not under stress. [21] When the first line is secured ashore, the windlass takes up the slack in the line.[22] Again it is not under any strain until the slack is taken out, and then it is under strain for only a few minutes while the line is transferred to mooring bitts.[23] In undocking, the windlass is usually used to haul the lines back onto the ship, under no strain. [24]

In shifting, the windlass is sometimes used with or without the ship's engine to move the vessel from one position on a wharf to another.[25] The testimony showed that where this is done, strain is on the windlass until the vessel begins to move, following which the momentum of the sizeable ship will continue it in motion with little if any strain from the windlass.[26]

18. App. 183
19. App. 184
20. App. 187
21. *Ibid.*
22. *Ibid.*
23. App. 187-188
24. App. 3[illegible]
25. App. 190
26. *Ibid.*, also at App. 363-364.

The testimony further showed that acceptable noise levels are determined by the volume of the sound, measured in decibels, and the length of time of exposure to the noise.[27] The Occupational Safety and Health Act Noise Standards were mentioned frequently at the trial, and in fact were the only objective standards referred to during the trial. These standards provide maximum number of hours of daily exposure for various decibel levels. The OSHA periods of acceptable noise exposure are as follows:[28]

90 decibels - 8 hours daily
92 decibels - 6 hours daily
95 decibels - 4 hours daily
97 decibels - 3 hours daily
100 decibels - 2 hours daily
102 decibels - 1 1/2 hours daily
105 decibels - 1 hour daily

Turner's accoustical expert tested the equipment in question, and found that with the windlass on, the decibel reading was 70; with the windlass turning, the noise level reach 85.[29] Walking the anchor in and out was tested between 92 and 95 decibels.[30] Mr. Sperry conducted no tests which were in access of 95 decibels. Delta's accoustical expert, Mr. Kerr, found a decibel level of 82 with the windlass in operation, but with no strain on it, and 95 to 98 with the windlass running at full speed.[31] Thus the maximum permissible

27. App. 223

28. App. 284, Def. Ex. #6, 29 C.F.R. 1910.95 (b) (1)

29. App. 285

30. App. 264

31. App. 403

daily exposure on a continuing basis of all of the tests conducted on this equipment was two hours and 40 minutes. It is absolutely clear that Mr. Turner was not regularly submitted to anything approaching these limits.

A reference to Exhibit A hereto, which is a listing of the windlass activity for the first voyage from August 25, 1970 through October 18, 1970, shows that on 32 of the 55 days on this voyage, the anchor windlass was not even used. The longest docking or undocking during this period consumed 27 minutes, with most of the dockings in the range of 15 to 20 minutes. The raising and lowering of the anchors were conducted at all times between 5 and 10 minutes during these periods on the relatively few occasions during which they were used. It must be remembered that during most of the times when the windlass is being used, it is not under strain, such that the decibel readings found by Mr. Sperry of 70 and by Mr. Kerr of 82 were the noise levels experienced by Mr. Turner. These levels are acceptable for daily periods of continuous exposure in excess of 8 hours. It is further clear that only during a very small portion of these times were additional strains put on the windlass and these strains themselves were not constant but were intermittent with periods of rest. Accordingly taking the average docking and undocking, the probable maximum length of the time during which the windlass were under maximum loads would be in the range of 7 to 8 minutes. There is absolutely no testimony in this case which would put the noise of these windlass anywhere near, much less above the 115 decibel level which would be necessary to violate the OSHA standards. In fact the Trial Court refused to permit plaintiff's counsel to ask a hypothetical question as to decibels in excess of 100 since there was no proof of such noise levels, and such an assumption was properly described by

the Trial Court as "strictly speculative".[32] As stated by Chief Mate Galloway who reviewed the deck logs for all of the voyages when Mr. Turner was on the DELTA URUGUAY, the times of using the anchor windlass in the first voyage were representative of the subsequent voyages on which Mr. Turner served.[33] Although the deck logs were introduced into evidence, counsel for Turner did not attempt to challenge Mr. Galloway's statement in this regard since his statement is borne out by the deck log records of the use of the anchor windlass.

There was no proof that the noise from the cherry pickers or deck cranes was excessive considering the amount of exposure by the plaintiff. The only mention which the plaintiff made of the cherry pickers in the entire trial was that "they are very noisy, also".[34] Again the plaintiff did not show what exposure he had to the cherry pickers and it is legally impermissible for a jury to have found negligence or unseaworthiness based on the noise levels of the cherry pickers and the testimony adduced at the trial.

Dr. Norman, the only expert who was specifically presented with the exposure times which Mr. Turner experienced together with the decibel levels, stated that in his opinion, this occupational environment was entirely reasonable.[35] This was the only testimony on this point, and since the question of reasonableness of a noise environmental situation is a highly technical one well beyong the ordinary experiences of a jury, there was no evidence from which the jury could have found to the contrary.

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32. App. 389
33. App. 347
34. App. 157
35. App. 376, 378-379

On the question of damages, it is clear that at the worst, Mr. Turner will have the inconvenience of the tinnitus on a permanent basis. The doctors said it was possible that it would come and go, but probably it was permanent.[36] This situation will not affect Turner's ability to work since it does not affect the speech frequency range, and there is no testimony that it ever would.[37] Accordingly, the award of $129,000 was clearly grossly excessive.

The basis for federal jurisdiction is the admiralty and maritime jurisdiction conferred by Article III, Section 2, of the United States Constitution, and confirmed by 28 U.S.C. § 1333.

(f) *Reasons for Granting the Writ*

(1) The Court below erred in affirming the jury's finding of liability since there was not one scintilla of evidence that the noise levels were unreasonable.

The reasonableness of a noise environment is determined by two factors: The volume of the sound and the length of exposure. The evidence in this case points to no other conclusion but that the noise levels were reasonable for the exposure in question. The jury's finding to the contrary was clearly erroneous and the Court below erred in affirming its decision.[38] For the jury to have found unseaworthiness or negligence, the evidence would have had to show that Delta failed to provide a reasonably safe noise environment. It is hornbook law that Delta did not have to supply

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36. App. 220
37. App. 215
38. *McAllister v. U.S.*, 348 U.S. 19

the best or latest equipment, nor did Delta insure that Turner would not suffer hearing loss or hearing difficulties from the noise exposure.[39]

Turner presented three expert witnesses: ear specialists Drs. Ilgenfritz and Rubin, and acoustical professor Sperry.

Taking Dr. Ilgenfritz's testimony in the light most favorable to Turner, it is clear that Dr. Ilgenfritz does not support Turner's contention that his hearing condition resulted from eleven months' service on the DELTA URUGUAY:

Q Dr. Ilgenfritz, in the report which you have rendered to Mr. Bradley, in connection with your examination, as I appreciate it the man came to you and gave you this history. He said he had been employed by the Delta Lines since 1949 and, using your words, working in a particularly noisy environment especially over the last three or four years. That is the history that was given to you?

A Yes

Q It was on the basis of this history, exposure to loud noises for three or four years, that you came to the conclusion that you did. Since you had no other explanation for the hearing loss and you did have this history of three or four years exposure to the noise, you related the two?

A Yes, that is correct.[40]

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39. *Mitchell v. Trawler Racer Inc.*, 362 U.S. 539.

40. App. 299

Considering the fact that Turner alleged to have first noticed the hearing problem five months after he came aboard the vessel, and that it has not since worsened,[41] it is really Turner's first five months aboard the vessel which are of importance here. Clearly, Dr. Ilgenfritz's conclusion that Turner's hearing condition was related to noise exposure of three or four years' duration does not support his claim against Delta.

Both of the ear specialists and acoustical professor Sperry agreed that the question of the reasonableness of a noise environment is based on two factors: the intensity of the noise, and the periods of exposure.[42] Although Dr. Rubin admitted that the extent of the exposure and the intensity of the noise are the crucial factors, he was not presented any facts as to either the intensity or the length of exposure:[43]

Q Dr. Rubin, how many hours did Mr. Turner tell you he was exposed to this hydraulic anchor windlass?

A I don't have a record from Mr. Turner as to how many hours he was exposed. This came in on the original letter of consultation from Mr. Bradley. The only information that I have on the number of hours that he was exposed is based upon Mr. Bradley's letter.

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41. App. 196-197

42. Dr. Rubin at p. 228 and 230; Dr. Ilgenfritz at p. 299; Sperry at App. 278, 883

43. App. 223, 224, 225

Q Well, do you have any figures as to how long this man was exposed to the noise?

A Yes, based on the letter from Mr. Bradley. This is the letter, the only hourly situation that I have, or guide. I have a copy here if you would like to read it, because I don't know offhand.

Q Are you talking about counsel for plaintiff?

A Yes, sir.

Q And, you base your opinion on a letter from counsel for plaintiff, rather than the plaintiff himself?

A I did not say that. I took a history.

Q What history did you get from plaintiff as to the number of hours of exposure?

A I don't have a history of the number of hours but I have a history of him telling me about the kind of noise and the fact that this went on for four or five months and began at a certain time and that's when his tinnitus occurred.

Q To be a little more specific, tell me exactly what you have in terms of explanation for his condition from this plaintiff?

A Yes. As I have read previously, the plaintiff stated that he detected the ringing or the tinnitus in his ears and this has been present more than a year and he related it to the four or five months exposure and in relation to the running of the hydraulic anchor windlass.

Q That's it?

A That's it and that was his job for that period of time.

Q But, no reference to how many hours?

A No, sir.

Q No reference to loudness?

A No, sir.

Again, at best, Dr. Rubin indicated that Turner's hearing situation was consistent with noise exposure:[44]

A And, in order to come to a conclusion, the conclusion which you reached, you reached this simply because he said he had been running a hydraulic anchor windlass and you related these problems that that he had, the ringing intensity and the noise but not the number of hours?

Q I think if you will refer to my previous statement, I think I said it was consistent with the kind of hearing loss from exposure to such noises.

Q But, is it consistent with a hearing loss that can occur not from noise exposure?

A Yes, correct.

In the light most favorable to Turner, this testimony could be the basis for inferring that there may have been a

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44. App. 225

causal relationship between Turner's condition and the noise levels of the DELTA URUGAY. But this testimony obviously does not show nor suggest that the noise level of the anchor windlass was unreasonable. Since Dr. Rubin did not know the noise level, nor did he know the length of the exposure, and since he admitted that these were the crucial factors, (indeed Dr. Rubin was not asked to express an opinion as to the reasonableness of the noise environment) there was no way for the doctor to render such an opinion, nor could the jury reasonably infer from his testimony anything about the reasonableness of the noise environment in question.

After accepting the O.S.H.A. standards as proper and competent,[45] Dr. Rubin admitted that if the noise levels were within the O.S.H.A. standards, then Turner would have to be considered an individual peculiarly susceptible to ear damage from reasonably safe noise environments:[46]

Q . . .If the noise level that Mr. Turner was exposed to had been accepted as within the limits, as far as the standards circulated by O.S.H.A., would you then consider, if Mr. Turner did, in fact, have difficulty, as a result of these noises, would you consider him to be a susceptible individual?

A Very definitely and one further possibility. Even with the O.S.H.A. standards, if you give the number 90, there are people who are susceptible at (204) that number or 88 or 85 or any other number. There are still people susceptible at lower levels than those which are given.

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45. App. 229, 230

46. App. 237

Q Certainly, there are those people.

A Yes, there are.

It is further clear that a shipowner does not have to supply equipment which will not cause injury to the peculiarly susceptible, but only equipment which is reasonably safe for an ordinary seaman.[47]

Mr. Sperry's testimony had largely to do with his tests of the windlass. These tests revealed a decibel level of 70, with the windlass motor on, and 85 when the windlass drum was turning.[48] Both of these tests show that the noise levels of the windlass are acceptable under the O.S.H.A. standards for over eight hours of daily exposure.[49] Certainly, there was no testimony that Turner was exposed to these noise levels for anything like eight hours, and thus no proof that the noise level of the anchor windlass was unreasonable.

Mr. Sperry also tested the windlass while it was "walking out" the anchor chain. These showed noise levels between 92 and 95 decibels,[50] a noise environment which is considered acceptable for continuous daily exposure of four to six hours by O.S.H.A.[51] Since Mr. Turner testified that the longest period for raising or lowering the anchors would be between 20 to 30 minutes,[52] again this level is clearly within acceptable limits under O.S.H.A.

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47. *Hill v. Flota Mercante Grancolombiana*, 267 F.Supp. 380 (E.D. La., 1967); aff'd. per curiam, 405 F.2d 878 (5 Cir., 1969); cert. den., 395 U.S. 934

48. App. 285

49. *Supra*, p. 10

50. App. 264

51. *Supra*, p. 10

52. App. 185

While Mr. Sperry did talk at great length about sound stifling devices and ear protectors, he admitted that O.S.H.A. suggested the installation of sound stifling devices only when the exposure levels were exceeded, and suggested the use of ear protective devices only when the noise levels could not be brought within acceptable limits even after acoustical devices were added.[53] Clearly, since the only tests which Sperry ran were well within the O.S.H.A. limits, his opinions concerning sound stifling devices or ear protectors go to the question of the *best* noise environment, and not to the question of the reasonableness of the environment.

Since the testimony of the above three witnesses produced nothing, Turner is forced to rely on his own unsupported testimony to provide the basis for reasonable and fair-minded men to be able to conclude that the vessel was unseaworthy and/or that Delta was negligent. No other crewmember of the vessel was called, nor was any evidence adduced to support this allegation other than the testimony of Turner himself.

When asked about the noise of the windlass, Turner said that it was "very loud, very noisy".[54] When asked by his counsel to describe the noise during operation, Turner said, "It would be just a loud growling, screaming noise. The noise screamed *all the time, it's not quiet at all*, and the more pressure, the more strain they put on the lines, the louder the motor gets because of your load that is being put on it."[55] Turner has thus committed himself to the proposition that the anchor windlass screamed at all times when on. Yet we know, from the testimony of his own witness that when the anchor windlass drum is turning, at full speed, the decibel level is 85. While both of these noise levels may be considered by Mr. Turner to be very loud, very noisy, or loud, screaming noises, the testimony of acoustical expert Sperry, when combined with the O.S.H.A. standards, show that even while the drum of the windlass is running at full speed, the noise level is within acceptable limits for daily exposures in excess of eight hours. Accordingly, based on the only scientifically tested noise levels presented by Turner, the vessel was well within acceptable standards, and there was no basis upon which a jury could have found it to have been unseaworthy, nor its owner negligent.

53. App. 284-285

54. App. 141

55. (Emphasis supplied) App. 151

Doubtless Turner will argue that from his statement that the windlass gets louder with strain, the jury could speculate that the noise exceeded acceptable limits, even though admittedly there is no direct evidence of this allegation. How rank such speculation would have to be is evident from an analysis of Turner's own testimony as to the periods of time during which the windlass would have been under strain.

Let us first consider Turner's testimony concerning lowering anchors:[56]

Q In using the anchor, as I appreciate it, the windlass may not be used at all to lower the anchor, is that correct?

A Only when you drop the anchor out. Sometimes it's used to drop your chain, sometimes.

Q But usually it is not.

A Usually not.

56. App. 182-183

Q If the anchor is up against the skin of the ship you may walk it out a bit with the windlass before dropping it down, is that correct?

A Yes, sir.

Q And that is just a matter of a few minutes?

A Yes, five or ten minutes.

Q And then after that you simply drop the anchor?

A Yes.

Here there can be no room for speculation. For we know that in lowering the anchor, the windlass is either not used, or it is used for five or ten minutes to walk out the anchor, an activity which Mr. Sperry measured to be 85 decibels. This activity thus is clearly within acceptable limits.

On raising the anchor, Turner stated there may be a strain when first raising the anchor if it is embedded in mud. However, Turner's testimony is further as follows:[57]

Q When the anchor frees itself from the mud, is that strain reduced?

A Oh, yes.

Q Considerably?

A The minute the anchor clears the bottom then all of your strain is off of it.

57. App. 184.

Q More or less like walking the anchor in and out?

A Yes.

Q It has about the same amount of strain then?

A Yes, sir.

Here again, once the anchor has cleared the bottom, we know from Mr. Turner the amount of the noise, since it is just like walking the anchor in and out, measured by Mr. Sperry at 85 decibels. Turner further testified that the shortest time to raise an anchor would be five minutes, and the longest between 20 and 30 minutes. It is also clear that the anchor is not used daily; it is not used at sea nor in many ports. When it is used, it is only sometimes that it becomes embedded, and obviously this strain would only be a fraction of the time used to raise the anchor. It is clear that on the few occasions on these voyages when the anchor does become embedded, the strain would be on the windlass for a very short period of time, certainly no more than ten minutes. In order for the noise level involved to have been considered unsafe under the O.S.H.A. standards, the decibel readings would have had to exceed 115. There is certainly no testimony in this record which would support such a finding, and as stated previously, the court below termed reference to decibel levels in excess of 100 as "strictly speculative".[58] Considering the few numbers of times that the anchor would be embedded, and the total absence of proof as to what the noise level was, to find that the noise level exposure was unreasonable would require pure speculation.

58. App. 389

As to the use of the windlass during docking, Turner testified that the anchor windlass would be turned on when the first line is thrown ashore.[59] He further admitted that by the term "turned on", he merely meant the machine was operating, but that the drum was not turning nor was it under any strain.[60] Here again, we know from Mr. Sperry's testimony that the decibel level was 70. After the line is secured ashore, the windlass is used to take up the slack.[61] Again Turner admitted that there was no real strain on the windlass until the slack had been taken out.[62] Once the slack was taken out, there was strain on the windlass for a short time until the line was put on the mooring bitt at which time the strain was removed from the windlass,[63] and the noise level was thus back to the 70 decibel operating position. In fact, Turner admitted once the strain was put on the bitt, the windlass would have to be turned off and in some instances was.[64] When a second line was thrown ashore, the process would have to be repeated.[65] This was done for three or four lines, depending upon how many lines the vessel put out at the particular dock.

According to Turner's estimate, the average docking lasted 45 minutes to one hour.[66] Assuming this to be the case, it would take between 10 and 15 minutes to handle each

59. App. 187.
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. App. 187-188
64. App. 189
65. App. 189-190
66. App. 191

mooring line. Of this time, there is a period when the line is thrown ashore, at which time the noise level is 70 decibels, a period when the slack is being taken up, measured between 70 and 85 decibels, a period when there is some strain on the windlass, the decibel level being unknown, and the final period when the line is placed on the mooring bitts. Allotting one quarter of the time for each of these activities, the windlass would be under strain for between 3 and 4 minutes followed by periods of 9 to 11 minutes when the windlass noise would be well within the limits for an eight hour daily exposure period.

Since there is no direct evidence as to the extent of the noise during the alleged strain on the windlass, the only way the jury could have found the noise levels unsafe would have been to speculate as to the amount of increase of noise as a result of strain. If the jury assumed that strain would increase the decibel level as much as 10%, this would total approximately 93 decibels, an acceptable level for daily use of periods of four to six hours. If the jury speculated an increase of 20%, this would total 102 decibels, a level which is acceptable on a daily basis for one and a half hours. If the jury assumed a 30% increase, the decibel level would be up to 110, which is acceptable on a daily basis for 30 minutes. If the jury speculated as much as 35%, raising the decibel level to 115, this limit would be acceptable for 15 minutes of daily exposure. Since the exposure to this strain was for an extremely small period of time, on quite infrequent occasions, the jury could have had to enter into the rankest speculation, described by the trial court as, "strictly speculation" based on no evidence whatsoever, in order to find that this noise level exposure was unreasonable.

This is exactly the type of speculation which the Fifth Circuit rejected in reversing a jury finding of contributory negligence in *Urti vs. Transport Commercial Corporation*, in which the Court said:[67]

> "Because of the absolute absence of direct evidence of contributory negligence, the defendant argued that the jury might have inferred that the plaintiff gave improper signals to the boatswain, causing excessive strain on the breasting line. Such a conclusion by the jury would have been mere conjecture and speculation, and not inference because there is not a scintilla of evidence in the record tending to show negligence in giving signals to the boatswain".

The language in *Urti* quoted above, with few changes, is clearly applicable to this case:

> "Because of the absolute absence of direct evidence of the intensity of the noise or the times of exposure to the anchor windlass while under strain, the plaintiff argues that the jury might have inferred that the noise levels were so great, and the exposures so large, that the vessel thus became unseaworthy and the ship owner negligent. Such a conclusion by the jury would have been mere conjecture and speculation, and not inference, because there is not a scintilla of evidence in the record tending to show unseaworthiness or negligence in the noise level of the anchor windlass".

67. 479 F.2d 766, 770 (5th Cir. 1973).

Certainly a directed verdict should have been given on the allegation based on the noise level of the cherry pickers, or cranes which are located some 25 feet aft of the anchor windlass.[68] Turner never did state what his exposure to this alleged noise was, except that sometime it was on when he was operating the anchor windlass.[69] Mr. Sperry took sound levels of the cherry pickers which were in the 73 to 85 decibel level, again clearly within acceptable levels for 8 hours of exposure. Furthermore, Mr. Turner mentioned the cherry pickers only in passing in his testimony, and obviously did not attempt to show that it was the noise of the cherry pickers that caused him any difficulty whatsoever. In the history which he gave Dr. Rubin, he referred only to the noise of the anchor windlass,[70] and it is clear that Turner's claim is based solely on the noise of the anchor windlass.

The evidence introduced by Delta could lead reasonable and fairminded men only to the conclusion that the noise environment of the vessel was clearly within reasonable limits. Chief Mate Galloway reviewed the deck logs for the voyage in question and showed how minimal the exposure to the windlass was. He also testified that the noise levels of the windlass under strain was approximately the same as that of walking out the anchor, namely on the 92 to 95 decibel range. Mr. Kerr, an acoustical expert, testified as to the tests he ran on the windlass, from which it was clear that the noise levels were safe and well within O.S.H.A. Standards. Dr. Frank Norman, ear, nose, and throat specialist, testified in response to a hypothetical question based on

68. App. 139
69. App. 156
70. App. 224

the actual noise levels and time of exposure, that the noise environment was reasonably safe. The testimony of these three men served to crystalize the only reasonable conclusion from the facts in question, namely that the noise levels were reasonably safe.

Chief Mate Galloway served five and a half years on the DELTA URUGUAY. He confirmed that in lowering the anchor, if the windlass is used at all, it is used only to walk out the anchor for about 5 minutes.[71] This decibel level was recorded by Mr. Sperry at 92 to 95, within acceptable limits for 3 to 4 hours of daily exposure. Galloway estimated the time of raising the anchor at about 10 minutes.[72] Mr. Turner had admitted that most of this time, after the anchor cleared the bottom, the noise level was the same as walking out the anchor.[73] Mr. Galloway confirmed that in docking, the only real strain on the windlass is the short period of time from the time the slack is taken out of the line until the brake is put on the windlass, or the line is transferred to mooring bitts.[74] In undocking, Mr. Galloway said that the windlass is only used to bring the mooring lines back on to the ship. There is no tension or strain on the line or windlass at that time.[75] In general terms, therefore, Mr. Galloway showed that the vast majority of the times the windlass is used, it is not under strain, and that the noise levels tested

71. App. 319
72. App. 320
73. App. 183-184
74. App. 320-321
75. App. 329

by Mr. Sperry of between 70 and 85 decibels are applicable.

Mr. Galloway testified that the noise level of the windlass under strain of the mooring line was about the same as raising an anchor, and that this noise level was about the same as walking out the anchor.[76] As stated above, this was measured by Mr. Sperry at 92 to 95 decibels, acceptable for four to six hours of exposure. Since Mr. Galloway testified that raising the anchor took between 10 and 15 minutes, lowering the anchor took between 5 and 10 minutes, docking usually took one half hour, and undocking took 20 minutes, his testimony could only lead to the conclusion that the noise levels were reasonable. Mr. Galloway's additional testimony was also the most precise testimony there was as to the actual usuage of the windlass. He referred to the deck logs of the voyage in question, logs which keep minute by minute records of the operation of the vessel. By reference to the logs, Mr. Galloway clearly demonstrated the minimal exposure which Turner had to the noise of the anchor windlass. Galloway testified, as had Turner, that the windlass was turned on when or after the first line was sent ashore.[77] The windlass was turned off when or before the logs indicated the vessel was secured alongside.[78] Also in undocking, Galloway testified that the windlass would be turned on just before the first line was brought aboard, and would be turned off after all lines were aboard.[79] The log entries are specific as to the time the anchor is let go, and the time between commencing raising the anchor and the time the anchor is aweigh. The logs further show the times of the shifting the vessel.

76. App. 323
77. App. 320
78. App. 341
79. App. 344

Mr. Galloway went through the logs for the first voyage that Mr. Turner was aboard the vessel and gave the time of docking and undocking, shifting, and the raising and lowering of anchors. The windlass activities during these procedures are set forth in more detail in Exhibit A to this petition. The logs show that of the 55 days of the voyage, the windlass was not used on 32 days, mostly because the vessel was at sea during these periods. On the voyage, there were 13 dockings and 13 undockings. The shortest dockings were 6 minutes, the longest docking was 27 minutes (which included anchoring). The average docking time on this voyage was 15.846 minutes. The longest undocking took 24 minutes, and the shortest undockings were 4 minutes. The average undocking took 13.23 minutes. The anchor was raised and lowered seven times. The longest time for raising the anchor took 15 minutes, and the shortest 5 minutes. The average in raising the anchor was 8.71 minutes. While the times for lowering the anchor were not specified in the logs, this is unimportant since, as Mr. Turner said, usually the windlass is not used to lower the anchor, and when it is, it would only be walked out for about 5 minutes. Walking out of the anchor as stated above has been tested at between 92 to 95 decibels, an acceptable period for four to six hours of daily exposure.

Applying the above times of usage of the windlass to the noise levels, both measured and unmeasured, it is clear that the exposure was minimal and the noise levels reasonable. The noise level of the windlass in lowering the anchor and in undocking, are clearly proved to be within acceptable limits. As stated, in lowering the anchor, if the windlass is used, it is only used for approximately five minutes at decibel levels which Mr. Sperry proved to be between 92 and 95 decibels, acceptable for four to six hours of daily

exposure. Clearly these noise levels are acceptable for periods of 5 minutes exposure of which occured a maximum of 7 times during the period of 55 days. In undocking, the only testimony in the record is that there is no strain on the windlass since the windlass is merely used to pull in the mooring lines which have been released from the docks. The average 13 minute or so undocking, and even the longest undocking, are clearly within the acceptable limits since Mr. Sperry showed that the windlass in the on and turning position ranged between 70 and 85 decibels, levels which are acceptable for daily exposure in excess of 8 hours. In raising the anchor, assuming at the outside a fact which has not been proven or even suggested, that half of the time of raising the anchor consists of a strain while it is being removed from the mud, such a strain would be for a minimum of 2 1/2 and a maximum of 7 1/2 minutes and on the average of 4.36 minutes. Certainly this is extremely minimal time, and the noise levels would have to be overwhelming to be considered unsafe. There was no proof of this, and a conclusion in this regard could be reached only by the rankest speculation. Similarly, in docking, even if it is estimated that the windlass is used one-half of the time under strain, a fact which is totally inconsistent with the other activities which are going on while the vessel is being docked, this would take from a mimimum of 2 to a maximum of 12 minutes and an average of 6.6 minutes. It is certainly more probable from the evidence that the strain is actually less than one-fourth of this time, or an average of 3.3 minutes. Again, the noise intensity for these minimal exposures would have to far exceed any noise levels measured by any of the experts, and again would require the rankest speculation. There certainly is no proof to this effect. In fact, the only proof is that the maximum decibel range is in the range of 95 decibels or slightly in excess thereof,

clearly reasonable under the exposures shown above.

The logs further show that the first voyage was truly representative of the noise levels experienced on the other four voyages, so that we will spare the court the burden of going through each voyage. Mr. Galloway testified that he had reviewed the logs for the other four voyages, and that the first voyage was truly representative of the others.[80] Although the logs were introduced, and Turner's counsel had the opportunity to challenge Galloway's statement in this regard, counsel did not even attempt to do so, indicating he concurred that the other logs would bear out Mr. Galloway's testimony.

Mr. Kerr, an acoustical engineer, testified that he too examined the anchor windlass when it was in operation, and when the drum was turning at full speed. While his decibel readings were somewhat in excess of those obtained by Mr. Sperry, they still were well within acceptable limits for the period of exposure shown above.[81]

Dr. Frank Norman, an ear, nose and throat specialist, was the only expert in the entire case who was presented with the facts as to the intensity of the sound and the noise exposure, and asked whether he had an opinion as to the reasonableness of this noise environment. This question was precisely limited to the first voyage which Mr. Turner sailed on and described the exact time of exposure with estimated decibel levels up to 95. The doctor was then asked as to whether or not he had an opinion as to the reasonableness of this noise environment. The doctor replied:[82]

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80. App. 347
81. App. 403
82. App. 376

> "Well, those figures which you read out to me, yes, based on that, yes. I would say that they are reasonable and safe, particularly in an open environment such as a deck of a ship."

The doctor was further asked to assume that the decibel readings were in excess of 95 and as much as 100. The doctor said that this would not change his opinion at all.[83] The doctor was further asked to assume the type of the exposure that this man had and extended for a period of 5 months, and to give his opinion as to the causal of relationship between the tinnitus condition and the 5 month service aboard the vessel. The doctor replied:[84]

> "Well, given the facts you have given me, I would say it was highly unlikely that the noise to which he was exposed had injured him or caused any difficulty whatsoever with the hearing loss or the tinnitus."

The doctor was then asked to extend this period to 11 months and express an opinion. He did, saying that in his opinion it would be highly unlikely that there was a causal relationship between these conditions and the service aboard the vessel.[85]

On cross examination, Turner's counsel attempted to ask a hypothetical question involving decibel readings of 105, and 110. This was objected to because there was no evidence or suggestion of such decibel levels in the case at all.

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83. App. 378-379
84. App. 379
85. *Ibid.*

The court itself realized that decibel readings at this level were "strictly speculative", and would not allow counsel to ask the question.[86] It was thus apparent to the trial court that decibel readings in excess of 100 would have been strictly speculative, and that there was not a scintilla of evidence to suggest that the noise levels approached these readings. Since even the trial court recognized that decibel levels in excess of 100 had not been proved, and that questions based on such levels were "strictly speculative", and since Turner would have had to prove decibel levels well in excess of 100 because of the minimal exposure periods shown by the evidence, the District Court had to realize there was a complete failure of proof on the part of the plaintiff, and not one scintilla of evidence that the noise levels were unreasonable.

The Court below clearly erred in finding that this appeal contained factual questions only. A careful review of the record would show the total absence of any proof that the noise levels were unreasonable, and thus that the vessel was unseaworthy and the vessel owner negligent. Accordingly, the writ should be granted, the decision of the Court below should be reversed, and directions should be given to enter a judgment for Petitioner, or at the very least, to order a new trial on all issues.

(2) The Court below erred in not requiring a new trial on all issues.

As stated above, the Trial Court ordered a new trial because it found the damages award "extraordinarily excessive". However, the trial court ordered a new trial on damages only. Although Rule 59(a) of the Federal Rules of Civil Procedure permits partial new trials, their use is limited

86. App. 389

to cases where it clearly appears that the issues attempted to be separated can be separately retried without doing substantial injustice to either party. As this Court has said:[87]

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the other that a trial of it alone may be had without injustice to either party.

Professor Moore expresses the situation as follows:[88]

> Moreover, if a new trial is granted because of the inadequacy of the verdict and it appears that the verdict was a product of an illegal compromise or other misconduct on the part of the jury, the Court must grant a new trial on all of the issues and may not limit re-trial to damages as the issue of liability was never properly determined. Conversely, where the damages are excessive and the verdict is the product of passion or prejudice, a new trial as to all issues must be ordered.

A recent article in the Columbia Law Review states the problem tersely and accurately:[89]

87. *Gasoline Products v. Champlin Refining Co.*, 283 U.S. 494, 500.

88. Moore, "Federal Practice", Vol. 6A § 559.06, P. 59-83,84.

89. Sann, "Remittitur Practice in Federal Courts", 76 Columbia Law Review, p. 299, at 305.

> It is almost impossible for a trial judge to determine that the jury bias which infected the assessment of damages, played no part in the jury's finding on the issue of liability. There is always a danger that a jury which was unable to deal with the issue of damages in an unbiased manner was equally unable to deliberate dispassionately on the question of liability.

The Fifth Circuit ignored its own conclusions in *Korbut v. Keystone Shipping Co., Inc.*,[90] in which the Court refused to grant a new trial on the issue of damages alone despite the fact that this was the only area on which the jury could not reach agreement. The Fifth Circuit stated:[91]

> We think it important that the trial of this case took only two days, and that the issues of liability are not sufficient complicated to render their redetermination a burdensome undertaking.

The Fifth Circuit in *Korbut* further stated that if the plaintiff were entitled to damages, an ascertainment of them could best be determined by retrying the entire case. In this respect, *Korbut* and the case at bar are identical in that they both were tried within two days, and the issues of liability were not sufficiently complicated in either to render their redetermination a burdensome undertaking.

Considering the horrendous error which the jury made in awarding over two and one-half times the amount found by both Courts below to be the maximum amount which the

90. 380 F.2d 352, (5th Cir., 1967)

91. *Ibid.*, at p. 354.

jury could have awarded, Petitioner did not have a trial on liability before a fair and reasonable jury, an entitlement which the Seventh Amendment to the United States Constitution guarantees to Petitioner. Since Petitioner did not get a fair jury trial, the lower Court erred in not reversing the District Court and ordering a new trial on all issues.

(3) The Fifth Circuit's rule which prohibits remittitur to less than the maximum possible amount which the jury could have awarded under the circumstances deprives Petitioner of its constitutional right to a jury trial and conflicts with the Second Circuit's more appropriate rule which permits a remittitur to an amount which the Trial Court believes a properly functioning jury should have awarded.

The Fifth Circuit has held in *Gorsalitz v. Olin Mathieson Corp.*[92] and other decisions that where a jury verdict is clearly excessive or shocking to the conscience, the trial court may suggest a remittitur as an alternative to a new trial, but remittitur can be granted only to the maximum amount which the jury could have awarded. In other words, if the plaintiff is fortunate enough to have a runaway jury, the plaintiff is entitled to receive the most which the jury could have awarded under the circumstances.

Petitioner must respectfully question such a rule. While it is true that jury trials are guaranteed by the Seventh Amendment, it is certainly implicit that such trials should be fair to both parties. Petitioner concedes that the trial court should be permitted to suggest a remittitur only where the amount exceeds the maximum which could have been awarded. But once the jury has exceeded these limits, the trial court should be able to suggest remittitur to a

92. 456 F.2d 180 (1972); *cert. den.*, 407 U.S. 921, *reh. den.*, 409 U.S. 899.

figure which a properly functioning jury should have awarded. This is the rule followed by the Second Circuit and other circuits.[93] Such a rule does not constitute the substitution of the trial court's evaluation for that of the jury since if the plaintiff is not satisfied with the suggested amount, he can opt for a new trial. On the other hand, the only consolation that a defendant has when it has been victimized by a runaway jury in the Fifth Circuit is that the plaintiff will receive the maximum possible amount under the circumstance. Such a rule clearly deprives the defendant of the fair jury trial to which it is entitled under the Seventh Amendment. Professor Moore states the proposition as follows:[94]

> The majority of the cases, though, disclose no such standards at all, but seem to fix the amount of the residue somewhere between these two extremes, i.e., at a figure that the court believe a proper functioning jury should have found. This intermediate position give the defendant the benefit of the full supervisory power of the trial court, and yet the plaintiff still has his option to refuse to remit. And it moderately serves the function of remittitur aimed at avoiding the judicial waste of a new trial, for the plaintiff still has a strong incentive to remit. If, on the other hand, the trial court fixes the residue at the lowest amount that it would permit a verdict to stand, this constitutes a considerable intrusion

93. *Lanfronconi v. Tidewater Oil Company*, 376 F.2d 91 (2 Cir., 1967); *cert. den.*, 389 U.S. 951; *Raske v. Raske*, 92 F.Supp. 348 (D. Minn. 1950); *Grobengriser v. Clearfield Cheese Company*, 94 F. Supp. 402 (W.D.Pa. 1950); *Uris v. Gurney's Inn Corp.*, 405 F. Supp. 744 (E.D. N.Y. 1975).

94. Moore, *op. cit.*, p. 58-59.

> upon the jury's function and the plaintiff's incentive in remitting is reduced to minimum. True, if the court adopts the other extreme position and orders a remittitur of only that amount which exceeds the very maximum of recovery that it would uphold, the plaintiff has a very strong incentive to accept the option or remittitur. But the defendant, who has no option, does not have the benefit of the trial court's seasoned judgment as to an amount that is ample and yet thoroughly fair. And so we conclude that the intermediate position effects a fair and practicable adjustment.

Some text writers have suggested that the Fifth Circuit's rule is the only one consistent with the Seventh Amendment.[95] It is hard to believe, however, that the Seventh Amendment was designed to guarantee that if a plaintiff should experience a runaway jury, he would automatically be entitled to the maximum permissable amount. Such a rule clearly prevents the defendant from receiving a new trial to which he is entitled since it is difficult to conceive that a plaintiff would opt against a remittitur to the maximum possible amount in the hope of being able to obtain more than the maximum possible amount. This conceptual contradiction is inherent in the Fifth Circuit's rule.

Accordingly, Respondent suggests that the writ should be granted, and that the judgment of the Fifth Circuit Court of Appeals should be reversed with directions to order the Trial Court to consider the entry of remittitur to the amount which a properly functioning jury should have awarded as an alternative to a new trial on all issues.

95. Wright & Miller, "Federal Practice & Procedure", Vol. 11, Sec. 2815, p. 104-105.

(g) *Conclusion*

Accordingly, it is respectfully submitted that the writ of certiorari should issue to the Fifth Circuit Court of Appeals; that the decision of the Court of Appeals affirming the jury's verdict should be reversed with instructions to enter judgment for Petitioner, or at the very least to order a new trial on all issues; alternatively, the Fifth Circuit's rule on remittitur to the maximum possible amount should be set aside, and the case should be remanded with instructions that the trial court be directed to suggest a remittitur to the amount which a properly functioning jury should have awarded, as an alternative to a new trial on all issues.

Respectfully submitted,

G. Edward Merritt
Attorney for Petitioner
Delta Steamship Lines, Inc.
2100 International Trade Mart
New Orleans, Louisiana 70130

OF COUNSEL:

TERRIBERRY, CARROLL,
YANCEY & FARRELL

CERTIFICATE

I, G. Edward Merritt, a member of the Bar of this Court, do hereby certify that I have served a copy of the above and foregoing petition upon respondent's counsel of record, Owen J. Bradley, Esq., by mailing a copy thereof postage pre-paid properly addressed to his office in New Orleans, Louisiana, on this day of May, 1977.

G. EDWARD MERRITT

EXHIBIT A

WINDLASS ACTIVITY DURING FIRST VOYAGE OF TURNER'S EMPLOYMENT

DATE (1970)		ACTIVITY	TIME USED	
August	25		NOT USED	
	26		NOT USED	
	27	Undocking	0616-0630	24 minutes
	28		NOT USED	
	29		NOT USED	
	30		NOT USED	
	31		NOT USED	
September	1		NOT USED	
	2		NOT USED	
	3		NOT USED	
	4		NOT USED	
	5		NOT USED	
	6		NOT USED	
	7		NOT USED	
	8	Lower Anchor	NOT SPECIFIED	
	8	Raise Anchor	1053-1102	9 minutes
	8	Docking	1135-1154	19 minutes
	9		NOT USED	
	10	Undocking	1830-1839	9 minutes
	11	Lower Anchor	0700-	Not Specified
	11	Raise Anchor	1233-1239	6 minutes
	11	Docking	1317-1337	20 minutes
	12		NOT USED	
	13		NOT USED	
	14		NOT USED	
	15	Undocking	1003-1007	4 minutes
	16	Anchor & Dock	1906-1933	27 minutes
	17	Undocking	1630-1651	21 minutes

DATE (1970)		ACTIVITY	TIME USED	
September	17	Raise Anchor	1651-1656	5 minutes
	18	Docking	1839-1900	21 minutes
	19		NOT USED	
	20		NOT USED	
	21	Undocking	2127-2145	18 minutes
	22	Docking	0752-0809	17 minutes
	22	Undocking	1939-1950	11 minutes
	23		NOT USED	
	24	Lower Anchor	1358-1406	8 minutes
	25		NOT USED	
	26	Raise Anchor	0759-0814	15 minutes
	26	Docking	0830-0852	22 minutes
	27		NOT USED	
	28		NOT USED	
	29	Undocking	0000-0017	17 minutes
	29	Lower Anchor	NOT SPECIFIED	
	29	Raise Anchor	1053-1058	5 minutes
	29	Docking	1208-1214	6 minutes
	30	Undocking	0457-0508	11 minutes
	30	Docking	1753-1815	22 minutes
October	1	Undocking	1402-1417	15 minutes
	2	Lower Anchor	NOT SPECIFIED	
	2	Raise Anchor	0608-0618	10 minutes
	2	Docking	0704-0715	11 minutes
	3	Undocking	2028-2037	9 minutes
	4		NOT USED	
	5		NOT USED	
	6		NOT USED	
	7		NOT USED	
	8		NOT USED	
	9		NOT USED	
	10	Docking	1732-1749	17 minutes

DATE (1970)		ACTIVITY	TIME USED	
October	11	Undocking	0205-0228	23 minutes
	11	Raise Anchor	022-0235	
			0242-0246	11 minutes
	12		NOT USED	
	13		NOT USED	
	14	Docking	2342-2348	6 minutes
	15		NOT USED	
	16	Undocking	1700-1706	6 minutes
	17	Docking	0511-0518	7 minutes
	17	Undocking	1630-1634	4 minutes
	18	Docking	1855-1908	11 minutes

ORDER OF DISTRICT COURT DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Filed: February 19, 1975

Minute Entry
February 10, 1975
Cassibry, J.

PAUL TURNER — CIVIL ACTION

Versus — NO. 72-1565

DELTA STEAMSHIP LINES, INC. — SECTION "E"

This cause came on for hearing on an earlier date on motion of defendant, Delta Steamship Lines, Inc., for judgment notwithstanding the verdict, and in the alternative for a new trial, and in the further alternative for a new trial unless plaintiff files a substantial remittitur reducing the award.

Whereupon, and upon consideration thereof;

IT IS ORDERED that the motion for judgment notwithstanding the verdict be, and the same is hereby DENIED;

IT IS FURTHER ORDERED that the motion for a new trial be, and the same is hereby DENIED; and

IT IS THE FURTHER ORDER OF THE COURT that the motion for a new trial unless plaintiff files a substantial remittitur reducing the award be, and the same is hereby GRANTED; that the verdict be set aside and that there be a

new trial on the issue of damages, unless plaintiff enters a remittitur of $79,000.00, in which event judgment will be entered for plaintiff in the amount of $50,000.00.

s/ Fred J. Cassibry
UNITED STATES DISTRICT
JUDGE

REASONS FOR NEW TRIAL OR REMITTITUR

The plaintiff, Paul Turner, received a jury award in the amount of $129,000.00 for loss of hearing in the high frequency speech ranges and for tinnitus, or ringing in the ears, resulting from his exposure to loud noise in his work as a seaman for Delta Steamship Lines, Inc., aboard the SS Delta Uruguay.

In a lengthy resume of the reported cases involving hearing losses in the United States for the last twenty years, the defendant has demonstrated that the verdict in this case exceeds the maximum verdicts for hearing loss and associated problems by more than $100,000.00.

The jury's verdict in this case is extraordinarily excessive for the severity of plaintiff's injury and resulting disability. It far exceeds the maximum limit of a reasonable range that the jury could have considered. An excessive verdict may be reduced only to the maximum amount of damages that the jury might reasonable have awarded. *Gorsalitz v. Olin Mathieson Chemical Corporation*, 429 F.2d 1033 (5th Cir. 1970); *Jenkins v. Aquatic Contractors and Engineers*, 446 F. 2d 521 (5th Cir. 1971); *Glazer v. Glazer*, 278 F. Supp. 476 (E.D.La. 1968). The Court's task is to ascertain, by examining all of the evidence as to each element of damages, the maximum amount that the jury could have reasonably awarded. See *Britain et al v. Sears et al.*, CA NO. 70-1915 (E.D. La. 1974).

The items of damage which the jury was instructed to consider are (1) extent and duration of past, present and future pain and suffering, including any permanent injury resulting from the accident; (2) past, present and future mental anguish or mental suffering resulting from the injury; (3) impairment of earning capacity and impairment of ability to compete in the labor market, that is, impairment of ability to obtain employment under competetive conditions; (4) permanent physical disability of itself, if any, including limitations of plaintiff's normal physical functions, such as difficulty in indulging in sports, and limitation of his normal ability to enjoy the pleasures and pursuits of life.

The Court recognizes that the jury has a wide decretion as to each of these items in determining the amount to be awarded, and that the amount of awards in other cases has only limited value in determining the maximum amount that could reasonable have been awarded in this case because the facts and circumstances of each case, including the resulting effects of injury to a particular plaintiff, are different.

1. PAIN AND SUFFERING, INCLUDING ANY PERMANENT INJURY RESULTING FROM THE ACCIDENT.

The only pain and suffering in this case is the tinnitus, or ringing in the ears, which is more pronounced at some times than at others, and which produces the most discomfort and annoyance when the plaintiff is in a quiet environ-

ment, such as attempting to fall asleep. The tinnitus is less obvious when other sounds are present to distract the plaintiff, and is partially overcome even by the playing of soft background music.

The tinnitus is permanent and in addition the plaintiff has suffered a permanent hearing loss in the high frequency speech ranges. He has no hearing loss in the normal frequency speech ranges. With further noise exposure the hearing loss could involve the lower frequency speech ranges to the extent that a complete hearing loss would result, but this loss can be avoided by the wearing of ear protectors. Plaintiff now wears ear protectors at work on the recommendation of physicians.

This item is by far the one on which plaintiff should receive the largest damages. Considering the injury and that the plaintiff was 45 years of age at the time he suffered injury and has a life expectancy of 27 years, a reasonable range for the jury's consideration of this item is $10,000.00 to $30,000.00. The amount of $30,000.00 is recognized as the maximum amount that the jury could have awarded for this item.

Counsel for plaintiff attempts to justify the large verdict in this case by arguing that freedom from pain and suffering is one of the most valuable things in life and has great value. He reminds the court that he argued to the jury, as the law permits, that the damages for pain and suffering be calculated on a unit of time basis, and if the jury had given the plaintiff one dollar per hour for his waking hours of sixteen hours per day over his life expectancy of twenty-seven years, $157,480.00 would have been awarded for this item, and fifty cents an hour would have amounted to

$78,740.00.

In considering how much freedom from pain is worth, the jury also had to consider the severity of the pain and suffering, and the facts and circumstances of this case do not warrant the awarding of one dollar or even fifty cents per hour. Both of those figures exceed the maximum of a reasonable range.

2. MENTAL ANGUISH OR MENTAL SUFFERING RESULTING FROM THE INJURY.

The jury could have found that the plaintiff suffered some mental anguish when he learned that he would have the ringing in his ears every waking hour for the rest of his life, and will continue to suffer with that knowledge. There was evidence from which the jury could have concluded that the plaintiff has had relatively poor success in adjusting to and coping with the tinnitus, and this poor adjustment produces mental anguish. A reasonable range for this item is $500.00 to $5000.00, therefore $5,000.00 is recognized as the maximum.

3. IMPAIRMENT OF EARNING CAPACITY AND IMPAIRMENT OF ABILITY TO COMPETE IN THE LABOR MARKET, THAT IS IMPAIRMENT OF ABILITY TO OBTAIN EMPLOYMENT UNDER COMPETETIVE CONDITION.

The plaintiff is presently employed at no earning loss. In view of the evidence that ear protectors are needed to protect him from further hearing loss in a noisy environment, this item could have reasonably have been considered by the jury as warranting a sizeable amount of recovery.

Conceivably, circumstances in the future could require the plaintiff to compete in the labor market at a disadvantage upon divulging that he has to wear ear protectors in a noisy environment, and upon testing that would reveal his loss of hearing in the high frequency speech ranges. Giving consideration to the plaintiff's work life expectancy of 18 years, a reasonable range for this item is $1,000.00 to $10,000.00.

4. PERMANENT PHYSICAL DISABILITY OF ITSELF, OF ANY INCLUDING LIMITATION OF PLAINTIFF'S NORMAL PHYSICAL FUNCTIONS, SUCH AS DIFFICULTY IN INDULGING IN SPORTS, AND LIMITATIONS OF HIS NORMAL ABILITY TO ENJOY THE PLEASURES AND PURSUITS OF LIFE.

The hearing loss which plaintiff has sustained will prevent him from fully appreciating such things as a symphony orchestra or an opera, and the tinnitus might reasonably have been viewed by the jury as interfering with his enjoyment of the ordinary pleasures and pursuits of life, even conversation with friends. A reasonable range for this item is $1,000.00 to $5,000.00.

The maximum amount that the jury could reasonably have awarded therefore is $30,000.00 for item 1, $5,000.00 for item 2, $10,000.00 for item 3, and $5,000.00 for item 4, or a total of $50,000.00.

Owen J. Bradley, Esq.
G. Edward Merritt, Esq.

APPENDIX B

JUDGMENT OF DISTRICT COURT

Filed: March 7, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL TURNER	CIVIL ACTION
Versus	NO. 72-1565
DELTA STEAMSHIP LINES, INC.	SECTION "E"

J U D G M E N T

The Court having, on February 10, 1975, for the written reasons on file herein, granted the motion of plaintiff, to set aside the verdict of the jury and to grant a new trial unless plaintiff enters a remittitur of $79,000.00, and the plaintiff having advised the Court of acceptance of remittitur under protest;

Now, therefore, in accordance with the directions of the Court;

IT IS ORDERED, ADJUDGED and DECREED that there be judgment in favor of plaintiff, Paul Turner, in the sum of FIFTY THOUSAND AND NO/100 (50,000.00) DOLLARS, together with legal interest from date of judgment until paid and all costs.

New Orleans, Louisiana, this 7th day of March, 1975.

s/ Fred J. Cassibry
UNITED STATES DISTRICT
JUDGE

Owen J. Bradley, Esq.
G. Edward Merritt, Esq.

APPENDIX C

ORDER AFFIRMING JUDGMENT OF DISTRICT COURT

Paul TURNER, Plaintiff-Appellee, Cross-Appellant

v.

DELTA STEAMSHIP LINES, INC., Defendant-Appellant Cross-Appellee.

No. 75-1985

United States Court of Appeals, Fifth Circuit

Feb. 4, 1977

Appeals from the United States District Court for the Eastern District of Louisiana; Fred J. Cassibry, J.

Before JONES, WISDOM and GODBOLD, Circuit Judges.

PER CURIAM:

The appellee and cross-appellant, Paul Turner, a merchant seaman, brought an action against Delta Steamship Lines, the appellant and cross-appellee, to recover for the impairment of his hearing as a result of excessive noise on the vessel of Delta on which he was employed. A jury trial was had and a verdict was rendered for Turner. Under the coercion of a conditional order for a new trial, Turner filed a remittitur for the amount which the district court had found to be unjustified. Judgment was entered for the remaining amount. Delta has appealed from the judgment. In his cross-appeal Turner asserts that he is entitled to the full

amount of the verdict.

Although the grounds for the appeal and the cross-appeal are phrased in terms of legal propositions, the contentions are primarily factual. There is no error disclosed by the record. The judgment of the district court is

AFFIRMED.

APPENDIX D

JUDGMENT OF CIRCUIT COURT OF APPEALS

February 4, 1977

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-1985

D. C. Docket No. CA 72-1565 "E"

PAUL TURNER,
Plaintiff-Appellee - Cross-Appellant

versus

DELTA STEAMSHIP LINES, INC.,
Defendant-Appellant-
Cross-Appellee

Appeals from the United States District Court for the
Eastern District of Louisiana

Before JONES, WISDOM and GODBOLD, Circuit Judges

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that each party shall bear their own costs on appeal.

FEBRUARY 4, 1977

ISSUED AS MANDATE:

APPENDIX E

ORDER DENYING PETITIONS FOR REHEARING

Filed: March 2, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1985

PAUL TURNER,
Plaintiff-Appellee, Cross-Appellant

versus

DELTA STEAMSHIP LINES, INC.,
Defendant-Appellant-
Cross-Appellee

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITIONS FOR REHEARING
MARCH 2, 1977

Before JONES, WISDOM and GODBOLD, Circuit judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

s/ Warren L. Jones
United States Circuit Judge